ORIGINAL

EX PARTE OR LATE FILED

Robert W. Quinn, Jr.
Federal Government Affairs
Vice President

Suite 1000
1120 20th Street NW
Washington DC 20036
202 457 3851
FAX 202 457 2545

February 1, 2002

Via Electronic Filing
Mr. William F. Caton
Acting Secretary
Federal Communications Commission
445 12th St., S.W.
Washington, DC 20554

Re: *Application by Verizon-New England Inc. for Authorization to Provide In-Region InterLATA Services in the State of Rhode Island, CC Docket No. 01-324*

Dear Mr. Caton:

At the request of the Commission's staff, AT&T submits this *ex parte* letter to address the significance for this proceeding of the January 28, 2002 order on unbundled network element rates of the New York Public Service Commission (NYPSC)[1]. This NYPSC order resets Verizon's New York switching and other UNE rates based on more accurate information about Verizon's switching costs and current market conditions and technologies. The Order concludes that TELRIC now requires dramatically lower rates than the "temporary" UNE rates that have been effect in New York (subject to refund) since 1997. These new rates are also dramatically lower than Verizon's UNE rates in Rhode Island.

No. of Copies rec'd 0+1
List A B C D E

As explained in detail below, this NYPSC order means that Verizon's application for in-region interLATA authority in Rhode Island must be denied. In particular, Verizon has defended its Rhode Island rates on the sole ground that they are "comparable" to the rates that had been approved by the New York PSC in 1997 and that Verizon imported into Massachusetts in 2000. Verizon has relied on the facts that the 1997 New York rates were held to satisfy the checklist in the Commission's *New York § 271 Order* in 1999 and that, based on this 1999 finding, the Commission deemed the comparable Massachusetts rates to satisfy TELRIC in the Commission's *Massachusetts § 271 Order* in 2001. However, the *Massachusetts Order* expressly held that Verizon cannot "demonstrate TELRIC compliance based on the [1997] New York rates" in future applications for other states once the NYPSC concludes that those rates no longer satisfy the Act's requirement of cost-based rates. *Massachusetts Order*, ¶ 29; *see also id* ¶ 30 & Statement of Chairman Powell, p. 2.

Because the NYPSC has now unequivocally held the 1997 New York rates are too high to meet TELRIC under current conditions, Verizon's Rhode Island application – which seeks section 271 approval in 2002 – plainly cannot be granted on the basis that its rates are comparable to the 1997 New York rate or to the related Massachusetts rates. Verizon has advanced no other evidence or grounds that could support a finding that its current Rhode Island rates satisfy the checklist, and its application must therefore be denied.

Verizon contends that the Commission can grant the instant application despite the NYPSC Order. Verizon claims that the "complete when filed" rule or other related procedural conventions foreclose the Commission from considering the NYPSC's Order in its decision on the application. As explained in detail below, these claims are specious as a matter of law and

---

[1] Order on Unbundled Network Element Rates, *Proceeding on Motion of the Commission to Examine New York Telephone Company's Rates for Unbundled Network Elements*, Case 98-1357 (January 28, 2002) ("NYPSC Order").

are peculiarly without merit in light of the background of this proceeding – Verizon knew when it filed the application both the Commission's view that the 1997 New York rates could no longer be a valid benchmark if the NYPSC found them to be too high to reflect TELRIC and that the NYPSC was actively considering an ALJ recommendation to do just that. Moreover, reliance on those procedural conventions to allow Verizon to win approval of this application based upon a "benchmark" that is plainly no longer valid would constitute the very "heads I win, tails you lose" approach over which the court of appeals has previously expressed concern and would, ultimately, produce the truly absurd scenario of approval of a deficient application followed immediately by a Commission obligation to exercise its authority under § 271(d)(6) to revoke or suspend Verizon's long distance authority (or to order it to correct that deficiency) that the Commission warned about in the *Massachusetts Order*.

Verizon also contends that the Commission should ignore the NYPSC's finding that Verizon's forward-looking costs are much lower than the 1997 rates because the (enormous) difference relates "only" to the passage of time in a declining cost industry. In fact, the NYPSC's Order contains no such finding. To the contrary, the NYPSC's order makes clear that it may order refunds retroactive to 1997, which would certainly be appropriate given that the 1997 rates were never an accurate measure of TELRIC. But even if the rate decreases were solely attributable to the passage of time, that would hardly be a reason to allow Verizon to meet its checklist obligation to prove that its Rhode Island rates are TELRIC-compliant *today* with nothing more than a shortcut "benchmark" reference to 1997 New York rates that have been found *not* to be reflective of costs today. Any such attempt to ignore substantial cost declines and to wish away the undisputed economic reality that costs are rapidly declining would be patently arbitrary and could not possibly survive review. More importantly, Verizon's approach would remove any hope of real local competition outside of New York. If Verizon can continue

to hide behind the 1997 New York rates – even in the face of express findings by the regulatory body that set those rates that they do not reflect Verizon's costs – it will have no incentive whatever to reduce rates in its other states from the current entry-foreclosing levels.

It is important to recognize that this is not a case in which a party is alleging merely that the applicant's rates are outdated. Rather, this is a case in which the applicant's sole justification for its rates is to rely on old rates from another state that the other state has itself determined are "unwarrantedly high" and, if left in effect, would "impede the development of competition." NYPSC Order at 8. Verizon plainly could not rely upon the 1997 New York rates in New York. It is absurd to suggest that it may do so in Rhode Island.

Background. At the time Verizon filed its Rhode Island application, an Administrative Law Judge in New York had issued a decision that found that the 1997 New York switching rates were three times higher than TELRIC permits under current conditions and that reductions were required in other NY UNE rates as well. Although the NYPSC was actively reviewing this decision and could have prescribed new rates at any time, Verizon chose to defend its Rhode Island UNE rates on the single ground that they were comparable to the 1997 New York rates and the related Massachusetts rates. Verizon made no attempt to defend the Rhode Island rates on the merits or to respond to specific evidence that demonstrated that these rates are grossly excessive under TELRIC.

AT&T's Comments and Reply Comments demonstrated in detail that Verizon's Rhode Island UNE rates – and particularly its switching rates – are excessive. AT&T showed that these rates were not remotely based on an application of TELRIC to cost data, that they are products of erroneous inputs and major methodological and other errors, and that there are multiple respects in which Verizon's rates had been set in violation of the very TELRIC principles and inputs that had been prescribed by the Rhode Island Public Utility Commission ("RI-PUC") just a few days

before this application was filed. *See* AT&T Comments at 5-14 & Pitts Declaration ¶¶ 4-15; AT&T Reply Comments at 2-3; *see also* WorldCom Comments at 4-10.

Neither Verizon nor the RI-PUC made any substantial attempt to dispute that Rhode Island had made major errors in setting all the UNE rates, and they offered no defense whatsoever for the methodology and inputs used to set the switching rates. However, both defended the Rhode Island UNE rates on the ground that they purportedly are about the same as the rates that were set in New York in 1997 and later imported into Massachusetts.

This was the only basis on which Verizon defended its switching rates. Verizon's Reply Comments noted that AT&T and WorldCom had demonstrated "that the switching rates in Rhode Island cannot be TELRIC-based because the inputs used to calculate the rate adopted by the PUC suffers from various flaws." Verizon Reply Comments, p. 15. But Verizon made no attempt to defend the inputs. Instead, it argued that "there is no need to examine the inputs underlying the rates adopted by the [RI-]PUC, because the final rates are lower (relative to cost levels) than the rates that the Commission approved in Massachusetts and New York." *Id.* Thus, Verizon contended that under the Commission's precedents, the latter fact establishes that its rates are within the zone of reasonableness and that any methodological and input errors were harmless. *Id.* at 8.

The RI-PUC defended the switching rates on the same basis. In the November 28, 2001 Order in which it approved the switching rates at issue here, it stated that these rates "are adequate to support for local competition[,]" for the rates are "lower than Massachusetts' comparable UNE rates in April 2001 when the FCC approved Massachusetts's Section 271 application." Order, p. 5. Similarly, in its consultative filing before the Commission, the RI-PUC made a conclusory assertion that it "found the rates to be TELRIC compliant," but ultimately relied on the fact that the rates "are lower than the switching rates in effect when

Verizon received Section 271 approval in New York and Massachusetts." RI-PUC Comments, p. 44; *see also* RI-PUC Reply Comments, p. 3.

In their filings, both Verizon and the Rhode Island PUC acknowledged that the NYPSC was then actively reconsidering the switching and other UNE rates in New York and was reviewing the ALJ's recommendation that rates be reset at one third of the 1997 levels. But they relied on the Commission's holding in the *Massachusetts § 271 Order* that the mere fact of the NYPSC's "'ongoing review of UNE rates . . . ' in no way proves that the existing rates in New York and Massachusetts 'are not cost based'" (Verizon Reply at 11, *quoting Massachusetts Order*), and they contended that AT&T's and WorldCom's reliance on the ALJ's decision was then improper because "'the New York ALJ's decision has not been adopted by the NYPSC and even if it was, there is no certainty these rates would conform with TELRIC standards in Rhode Island." *Id., quoting* RI-PUC Report at 44-45. Verizon further suggested that the NYPSC might grant a pending motion to postpone its review of the NY ALJ's decision. Verizon Reply at 11.

Verizon and the RI-PUC did not deny that if and when the NYPSC adopted new lower rates, the Rhode Island rates could no longer be justified on the ground that they were comparable to rates that had previously been in effect in New York or Massachusetts.

Legal Discussion. The issue before the Commission is whether Verizon's current Rhode Island UNE rates – and particularly its switching rate – satisfy TELRIC today. The NYPSC's Order has now eliminated the only basis on which Verizon has defended its grossly inflated UNE rates. In particular, Verizon's attempt to justify these rates rests solely on the Commission's April 2001 holding in the *Massachusetts § 271 Order.* There, the Commission reluctantly concluded that Verizon could justify its Massachusetts switching rates on the ground that they were comparable (taking into account relative cost differences) to the temporary switching rates that had been approved by the NYPSC in 1997 and that had been found to satisfy TELRIC in the

Commission's *New York § 271 Order* in 1999. Now, Verizon seeks to justify its Rhode Island rates in 2002 on the ground that they are purportedly comparable both to the 1997 New York rates and to the version of those rates that Verizon imported into Massachusetts in 2000. However, the *Massachusetts § 271 Order* explicitly provides that Verizon's ability to justify rates in a state 271 application on the basis of the 1997 New York rates ends the instant that the NYPSC finds that those rates no longer satisfy TELRIC and orders the adoption of superceding rates. *See Massachusetts 271 Order* ¶ 29. Any attempt to grant this application on the basis of the 1997 New York rates and the related Massachusetts rates would thus be patently arbitrary, capricious, and contrary to the law. Each of Verizon's attempts to argue otherwise is specious.

The Massachusetts Order. As a preliminary matter, although the Commission granted Verizon's 2001 Massachusetts § 271 application on the ground that its switching rates were comparable to the 1997 New York rates, this holding was reached reluctantly by a divided Commission, and it is the subject of a substantial pending appeal. The reason is that, as Chairman Powell and the other individual commissioners in the majority had noted, there was substantial evidence both that the 1997 New York switching rates had been inflated at the time they were adopted and that those rates had become wildly excessive in the intervening four years because of the changes in market conditions and technology that had occurred during that period.

First, the 1997 New York rates were tainted and inflated when they were established. The NYPSC had based the rates on Verizon's false statements that "new switch" discounts that it had been receiving from switch vendors would be unavailable in the future, and Verizon's misrepresentation had substantially inflated the estimates of switch costs under the methodology the NYPSC employed. For this reason, when the NYPSC learned of these misrepresentations, it ordered that the 1997 switching rates be classified as "temporary" and provided that they had taken effect "subject to refund" to the extent that they were later determined to have been

inflated. The NYPSC's recent order has reaffirmed this conclusion, and it has ordered further proceedings on the question whether UNE purchasers are entitled to refunds of all or some of the differences between the new revised rates and the old rates back to 1997 or some other past date. NYPSC Order, pp. 42-47.

Second, the record in the 2001 Massachusetts § 271 proceeding contained overwhelming evidence that, whatever had been the case in 1997, the intervening declines in switching costs, increases in usage, and other factors meant that the 1997 New York rates grossly exceeded the costs that Verizon was incurring to provide switching in 2001 and that the 1997 rates would have to be substantially reduced when the NYPSC completed its then-pending proceeding. There was also unrebutted evidence that the 1997 rates were radically higher than switching rates that had been set in Oklahoma, Kansas, and a number of other states in the interim. For these and other reasons, there was substantial evidence that granting long distance authority to Verizon in Massachusetts would create a situation in which UNE purchasers could not compete against Verizon to provide local services because their costs would not be remotely comparable to those of Verizon, contrary to the very purpose of § 271.

These facts caused Commissioner Tristani to dissent from the grant of the application. *Massachusetts Order,* 16 FCCR at 9149 (Commissioner Tristani, dissenting). While the majority disagreed, Chairman Powell and other commissioners in the majority acknowledged the evidence indicating that the switching rates were excessive, stated that they found these facts troubling, but concluded that precedent and practical considerations required them to treat any rates that are comparable to the 1997 New York rates as valid until such time as the NYPSC ordered the adoption of superceding rates. *Massachusetts Order,* 16 FCCR at 9143 (Statement of Chairman Powell) & 9145-46 (Statement of Commissioner Ness). In particular, they concluded that the Commission lacked the institutional capacity to conduct its own "*de novo* evaluation" of current

switching costs "within the constraints of this 90 day proceeding" and that the Commission could not "speculate" on the outcome of the then-pending NYPSC proceeding "even if it is generally accepted that the rate is likely to be lower." *Id.* at 9043 (Statement of Chairman Powell).[2]

What is decisive for present purposes, however, is that the *Massachusetts § 271 Order* explicitly held that once the NYPSC concluded its then-pending proceeding and ordered the adoption of superceding lower rates – as it now has – Verizon loses the ability to justify switching rates in other states by reference to the NYPSC's 1997 switching rates. The Commission's Order expressly states that "[i]f the New York Commission adopts modified UNE rates, future section 271 applicants could no longer demonstrate TELRIC compliance by showing that their rates in the applicant states are equivalent to or based on the current [1997] New York rates, which will have been superceded." *Massachusetts Order,* ¶ 29; *accord* 16 FCCR at 9143 (Statement of Chairman Powell). Moreover, the Commission further stated that "a decision by the New York Commission to modify these UNE rates may" cause Verizon to fall out of compliance with § 271 and require the Commission to exercise its authority under § 271(d)(6) to revoke or suspend Verizon's long distance authority or to order it to correct the deficiencies. *Massachusetts Order,* ¶ 30; *see* ¶ 31 n. 78 (future NYPSC order could result in "Verizon falling out of section 271 compliance in Massachusetts."). As Chairman Powell explained, there can be "situations" in which such an NYPSC decision would mean that Verizon has "'ceased to meet [one] of the conditions required for [section 271] approval'" under § 271(d)(6) and in which the NYPSC order "would have the practical effect of requiring Verizon to find a new cost-based rates for switching." 16 FCCR at 9143 (Statement of Chairman Powell).

---

[2] The *Massachusetts Order* is now being appealed on the ground, among others, that this was an abdication of the Commission's responsibility under § 271(c)(2)(B)(ii) to deny applications when UNEs are not currently available at the BOC's current costs of providing them.

Against this background, there can be no question that the instant Rhode Island application would have been required to be denied if the NYPSC Order had been issued prior to the date on which the application was filed (November 26, 2001) or within the following twenty days (by December 16, 2001). However, AT&T understands that Verizon is contending that because the NYPSC Order was issued on January 28, 2002, the Commission cannot consider the NYPSC Order because of (1) the "complete when filed rule", (2) the rule under which a "change in the law" need not be applied to a pending application and (3) the fact that the NYPSC Order may not take effect until a few days following the February 24, 2002 deadline for the decision on this application. None of these claims have any merit.

The "Complete When Filed" Rule Is Inapposite. First, the "complete when filed" rule simply has no application here. This rule applies only to the BOC that files an application for § 271 authority. It is "designed to prevent applicants from presenting part of their initial *prima facie* showing for the first time in reply comments" *(Kansas/Oklahoma Order*, ¶¶20-21) and thereby undermining both the ability of parties to comment on the relevant facts and the Commission's ability to make determinations regarding the "veracity" of the BOC's information within the statutory 90 day period. *Ameritech Michigan,* ¶¶ 50-57; *see Kansas/Oklahoma Order*, ¶¶ 20-21. The complete when filed rule thus provides that a BOC's application "must address all the facts that the BOC can reasonably anticipate will be at issue under the proceeding" and that a BOC may not submit any additional evidence thereafter "that is not responsive to evidence or arguments raised by other parties" in their comments filed 20 days after the filing of the application. *Ameritech Michigan* ¶ 51. If a BOC files such additional evidence, the Commission reserves the right to restart the 90-day statutory clock on the application or to give the additional information no weight. *Id.* at ¶ 50; *Kansas/Oklahoma*, ¶¶ 20-21.

The "complete when filed" rule thus has no proper application to evidence that is submitted by parties other than the petitioning BOC and that establishes facts that require denial of the application. This is simple common sense. A rule that refuses to consider late filed BOC evidence merely means that the 90 day clock will be restarted and that the application, if meritorious, will be granted days later than it otherwise would be. By contrast, a rule that refuses to consider timely-submitted evidence from opponents to an application would result in the grant of applications that do not satisfy the checklist or the other statutory standards and that must be denied. In this regard, the Commission has considered orders of state commissions that are relevant to the question of whether a BOC in another state is in compliance with the checklist even when the orders were issued only two weeks before the end of the statutory 90-day period. *Michigan 271 Order*, ¶ 155-156 (relying on a proposed order of a hearing examiner of the Illinois Commerce Commission because it "provides evidence relevant to our inquiry regarding the readiness of Ameritech's OSS for Michigan").

Further, even if the "complete when filed" rule applied to submissions by parties other than the petitioning BOC, the rule has no application to the NYPSC's Order. This order is not evidence of the level of a BOC's OSS or hot cut performance or some other "fact" whose veracity is in doubt. Rather, the NYPSC Order establishes – under the Commission's own explicit precedents – that Verizon cannot justify its switching and other UNE rates on the sole ground that they are comparable to 1997 New York rates. The NYPSC Order means that Verizon's Rhode Island UNE rates can no longer be conclusively presumed to fall within a zone of reasonableness and that the Commission must decide the application on the basis of the evidence as to whether the rates in fact satisfy TELRIC. Here, as explained above, the undisputed evidence establishes that they do not.

Nor can Verizon plausibly suggest that the Commission should ignore the NYPSC Order based on some theory of surprise or prejudice. At the time the application was filed, Verizon knew the NYPSC was reviewing the NY ALJ's proposed decision and could adopt new lower rates any day. Yet Verizon elected not to adopt switching rates that it could defend as based on reasonable inputs and a reasonable application of TELRIC. Instead, Verizon chose to import rates based on the 1997 New York rates and to argue that these rates should be deemed to satisfy TELRIC because the NYPSC had not yet ordered lower rates, and might reject the ALJ's recommendation or might choose to stay its consideration of the ALJ's recommendation. Verizon Reply Comments, p.11. The fact that Verizon's predictions have proven to be false scarcely constitutes surprise or prejudice. Verizon expressly assumed the risk that the NYPSC would find that TELRIC now requires lower rates and that this fact would require rejection of the extreme claims on which Verizon elected to rest this application.

In addition, Verizon ignores that the Commission has repeatedly waived the requirements of the "complete when filed" rule at the behest of Verizon and other BOCs in otherwise indistinguishable circumstances when the waiver would allow the Commission to grant a BOC's application. *Kansas-Oklahoma Order*, ¶¶ 23-27 (2001) (relying on rates filed on 63rd day of the 90-day review period); *Texas Order*, ¶ 39 (relying on performance data for days after the 20th day); *Pennsylvania 271 Order*, ¶¶ 95, 98 (granting Verizon a waiver to submit and rely upon a new resale tariff governing DSL three weeks before the end of the 90 day period); *Connecticut 271 Order*, ¶¶. 29, 34-38 (granting Verizon a waiver to submit similar evidence at the end of the 90 day period); *see also New York Order*, ¶¶ 39 & 166 n.511 (denying motions to strike late filed BOC evidence).

The *Kansas Oklahoma Order* provides a stark example. There, evidence submitted in the comments had demonstrated that the UNE rates in effect at the time of the application were

excessive, and the Commission granted the application on the basis of rates that were filed and that took effect on the 63rd day of the 90-day review period. The Commission reasoned that opponents of the application had an opportunity to comment on the revised rates and that the reasons for the "complete when filed" rule – the prevention of sandbagging by the petitioning BOC – did not apply in that situation. *Kansas/Oklahoma Order,* ¶¶ 23-27. Those same considerations apply, *a fortiori,* to AT&T's reliance on the NYPSC Order. Because the NYPSC Order was not released until January 28, 2002, it could not have been brought to the Commission's attention at any earlier time, and Verizon can be given a fully opportunity to comment on the NYPSC Order – although not even Verizon can dispute that it eliminates the only basis on which Verizon had defended or could attempt to defend its excessive switching and other UNE rates.

Thus, even if the "complete when filed rule" had any applicability to the instant situation, the Commission's precedents would require that the rule be waived here as well. Indeed, it would be arbitrary and capricious for the Commission to refuse to do so. *Compare* Transcript of Oral Argument, *Sprint v. FCC,* No. 01-1075, p 22 (D.C. Cir. Sept. 17, 2001) (Court suggested that the FCC's reliance on rates in other states to demonstrate compliance with TELRIC but not to demonstrate noncompliance" means the FCC says that, "Heads we win, tails we win" and commented on "blizzard of ex parte communications" by the BOC that provided the basis for the Commission's finding of checklist compliance).

Verizon's proposed application of the "complete when filed" rule would also lead to other absurdities. Even if the Rhode Island application could be granted now by ignoring the NYPSC decision, the Commission would be required simultaneously to commence a proceeding under § 271(d)(6) to address whether Verizon's authorization should be "revoke[d]" or "suspend[ed]" unless it "correct[s] the deficiency" by immediately reducing its switching rates to the levels

required by the NYPSC decision. In particular, § 271(d)(6) provides for such a proceeding if a BOC that has received long distance authority has "ceased to meet any of the conditions required for" a grant of long distance authority. As the *Massachusetts § 271 Order* makes explicit, a NYPSC Order that supersedes the 1997 switching rates eliminates the sole basis on which Verizon's switching rates could be found to satisfy the checklist. *Massachusetts Order*, ¶ 30 & Statement Of Chairman Powell, p. 2. It would be absurd to grant a § 271 application on February 24, 2002, and then be required, days later, to revoke or suspend the authority on the basis of a fact that was placed before the Commission nearly a month before the February 24, 2002 deadline for the decision on the application.

Change In The Law Principles Are Inapposite. There also is no basis for Verizon's claim that the NYPSC decision is a "change in the law" and that this forecloses the Commission from relying on this decision in ruling on the application. Here, Verizon is apparently invoking the Commission's rulings that a BOC's compliance with the competitive checklist is to be assessed on the basis of the regulations that are in existence at the time that the application is filed and that an application need not be denied because the BOC does not immediately come into compliance with a revision to the regulations that takes effect while the application is pending. *See Texas § 271 Order*, ¶¶ 28-88; *New York § 271 Order* ¶ 31.[3]

However, there has been no change in the law here. The pertinent law is that UNE rates must satisfy TELRIC, and this has been the governing FCC regulation at all relevant times. Under the Commission's precedents, the NYPSC rate orders are simply evidence of whether particular rates do or do not satisfy TELRIC. In particular, the *Massachusetts § 271 Order* deemed the fact that Verizon's Massachusetts switching rates were comparable to the 1997 New

[3] For example, the Commission adopted its line sharing regulation while SBC's Texas application was pending and it held that SBC did not have to implement this requirement

York rates to be conclusive evidence that those rates satisfied TELRIC – regardless of the other evidence that the rates were excessive – until such time as the NYPSC adopts superceding rates. Because the NYPSC Order has adopted these superceding rates, Verizon can no longer rely on the 1997 New York rates to justify its Rhode Island switching rates but must rely on other evidence to demonstrate that they satisfy TELRIC. Because there is no other such evidence and because AT&T's and WorldCom's showing that methodological and other errors mean that the Rhode Island switching rates are wildly excessive is unrebutted, the instant application must be denied.

Further, Verizon's claims would fail by their own terms even if the NYPSC Order were a change in the law. Although the Commission's § 271 orders do not require BOCs to demonstrate immediate compliance with new regulations that are adopted while an application is pending, those orders assume that the BOC will in fact come into compliance with the new regulations in accordance with their terms after the application is granted. *See, e.g., Texas Order*, ¶¶ 28-88. Thus, if the NYPSC's decision were a change in the law, Verizon would be obligated to reduce its switching rates to levels comparable to those in New York. And critically, because Verizon can effect those rate reductions voluntarily with the stroke of a pen, Verizon's obligation to make those changes would take effect immediately.

Effective Date of NYPSC Order. Finally, Verizon cannot legitimately rely on the facts that the deadline for the decision on this application is February 24, 2002, but that the NYPSC has not required that the new substantially reduced New York rates take effect until four days later, *i.e.*, March 1, 2002.[45] Indeed, any such claim is specious.

---

immediately but could come into compliance with the regulation in accordance with its terms after the application was granted. *Texas § 271 Order*, ¶¶ 28-88.

[4]

First, the significance of the NYPSC's order is not that it has ordered rate reductions on a certain date. Rather, it is that the NYPSC has found that, under current conditions, the switching usage rates that it adopted in 1997 do not comply with TELRIC and are in fact almost three times too high. This finding conclusively refutes the only basis on which Verizon has claimed that its Rhode Island switching rates satisfy TELRIC. Indeed, the ultimate basis for that claim is that (i) the high rates had been approved by the NYPSC in 1997 and those rates had been held to satisfy TELRIC in the 1999 *New York § 271 Order*, and (ii) the Commission gave continuing conclusive effect to the 1997 finding in its *Massachusetts § 271 Order* in 2001. But the latter conclusion was reached only because the NYPSC had not yet adopted a superseding order adopting lower rates and because the Commission refused to "speculate" about the rates that the NYPSC would find appropriate based on a record that contained accurate information (as the 1997 record did not) and that reflected current market conditions and technologies. *See Massachusetts Order, Statement of Chairman Powell,* p. 2. The NYPSC's current finding that the 1997 rates are not TELRIC compliant in today's conditions eliminates any basis for a finding that the prior New York rates are a valid benchmark today, regardless of when Verizon's new revised tariffs take effect. In short, it is the NYPSC's findings and conclusions, not the effective dates of Verizon's tariffs, that are relevant here.

This claim is also baseless for a second independent reason. Verizon is *not* arguing that it has the right to hold off reducing its Rhode Island switching rates to the New York levels until the March 1, 2002 effective date of the new New York tariffs. Nor has Verizon committed that it will voluntarily adopt the new New York rates in Rhode Island by that date. To the contrary, Verizon's claim is that the Commission is permitted or required to grant it long distance authority

---

The NYPSC order is effective on January 28, 2002, but requires that Verizon file tariffs that contain the revised rates within 20 days (*i.e.*, by February 17, 2002) and that the tariffs incorporating those rates will take effect 10 days later (by March 1).

now without requiring any reduction in the Rhode Island switching rates today, on March 1, 2002, or at any time in the future. In Verizon's view, the Commission's task is merely to assure that the rates in effect in Rhode Island on February 24, 2002 are no higher than those in effect in New York on that date.

This is simply wrong. The Commission's job is not just to determine if the BOC can be deemed to be in compliance with the competitive checklist on the date of the decision. To the contrary, the Commission has made it explicit that its decisions granting long distance authority can and must predict that the BOC will be in compliance with the checklist after the authorization takes effect. As the Commission has stated, the grant of a § 271 application requires " a *predictive* judgment" that the petitioning BOC will actually furnish the checklist items in accord with the statutory requirements in the future, not merely that it is providing the required nondiscriminatory and cost-based access to network elements today. *Ameritech Michigan,* ¶ 113; *see id.* ¶ 110 ("the BOC may present operational evidence that the operations support systems functions the BOC provides to competing carriers *will be able* to handle *reasonably foreseeable demand,*" regardless of whether the BOC is meeting lower levels of demand on the date the application is decided). Moreover, assurance that a BOC will continue to comply with its § 271 obligations after obtaining § 271 approval always has been a core component of the Commission's determinations under § 271. *See, e.g., Kansas/Oklahoma § 271 Order* ¶ 269; *Massachusetts § 271 Order* ¶ 236; *New York § 271 Order* ¶ 429; *Pennsylvania § 271 Order* ¶ 127.

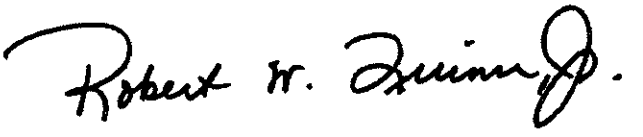
Thus, even under Verizon's view of the NYPSC decision, the Commission cannot grant an application on February 24, 2002 unless it finds that Verizon will reduce Rhode Island rates to the New York levels no later than March 1, 2002. This common sense conclusion is reinforced both by § 271(d)(6)'s assumption that the Commission will revoke or suspend an authorization,

ORIGINAL

or to take other appropriate remedial action, if a BOC ceases to satisfy the requirements of § 271 after an authorization has been granted and by the *Massachusetts § 271 Order's* holding (¶30) that enforcement action would be required in that state if the NYPSC adopts lower superceding rates before Verizon otherwise adopts TELRIC compliant rates in that state. *See also* Statement of Chairman Powell, at 2.

For all these reasons, AT&T respectfully submits that the NYPSC's decision requires that the Commission deny Verizon's Rhode Island application.

Very truly yours,



cc: Chairman Michael Powell
Kyle Dixon, Legal Adviser to Chairman Powell
Commissioner Kathleen Abernathy
Matthew Brill, Legal Adviser to Commissioner Abernathy
Commissioner Michael Copps
Jordan Goldstein, Legal Adviser to Commissioner Copps
Commissioner Kevin Martin
Sam Feder, Legal Adviser to Commissioner Martin
Linda Kinney, Associate General Counsel
John Rogovin, Deputy General Counsel
Debra Weiner, Assistant General Counsel
Dorothy Attwood, Chief, Common Carrier Bureau
Richard Lerner, Associate Chief, Common Carrier Bureau
Tamara Priess, Chief, Pricing Division, Common Carrier Bureau
Deena Shetler, Deputy Chief, Pricing Division, Common Carrier Bureau
Julie Veach, Policy & Program Planning Division, Common Carrier Bureau
Gary Remondino, Policy & Program Planning Division, Common Carrier Bureau
Kelly Trainor, Telecommunications Task Force, US Department of Justice
Ann Berkowitz, Verizon